79-55

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. .....

TENNESSEE HIGHER EDUCATION COMMISSION,
Petitioner,

v.

RITA SANDERS GEIER, et al., UNITED STATES OF AMERICA,
RAYMOND RICHARDSON, JR., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United Court of Appeals for the Sixth Circuit

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The Petitioner, Tennessee Higher Education Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on April 13, 1979, requiring a merger of Tennessee State University and the University of Tennessee at Nashville, and that upon hearing, the judgment be reversed.

OPINIONS BELOW

The opinions of the District Court in this case are reported as *Sanders v. Ellington*, 288 F. Supp. 937 (M.D. Tenn. 1968); *Geier v. Dunn*, 337 F. Supp. 573 (M.D. Tenn. 1972); and *Geier v. Blanton*, 427 F. Supp. 644 (M.D. Tenn. 1977).

The opinions of the Court of Appeals requiring the merger of the two institutions, and denying the Appellees' application for a stay of the merger, are not yet reported. Copies of these opinions are appended hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1977. This court has jurisdiction pursuant to 28 U.S.C. §1254(i).

QUESTIONS PRESENTED

1. Whether the existence of an 85% black student enrollment, at a single historically black State university constitutes a violation of the Fourteenth Amendment by the State, when such enrollment is produced by free student choice, pursuant to good faith open admissions policies, and is not found to have been caused or supported by any current or recent unconstitutional State action.

2. Whether a finding of a Constitutional violation on such a basis can be sustained, in light of a finding in the same case that the State-wide system of higher education, in which the 85% black institution is included, is being adequately integrated.

3. Whether it is a proper exercise of the remedial power of a Federal court to require that an independent institution of higher learning, not found to have engaged in unconstitutional conduct contributing to the predominately black enrollment at another institution, be required to involuntarily merge into such other institution, solely in order to reduce the black enrollment at the latter.

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the United States Constitution:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Nature of the Case

The complaint in this case was filed in 1968 by citizens of the State of Tennessee, seeking to enjoin the physical expansion of the University of Tennessee at Nashville (UTN). The Plaintiffs' theory was that the expansion of UTN would impede the desegregation of predominately black Tennessee A & I University (presently known as Tennessee State University and referred to herein as TSU), which is also located in Nashville. The United States subsequently intervened as a Plaintiff, supporting the request for an injunction and requesting that the State of Tennessee be required to formulate a plan for the desegregation of public universities throughout Tennessee. The District Court entered a judgment on February 28, 1977, holding that the desegregation of institutions of higher learning was proceeding at a Constitutionally permissible rate on a State-wide basis, but that the existence of an 85% black enrollment at TSU was an im-

permissible vestige of previously *de jure* segregation within the Tennessee system of higher education. In order to remedy this perceived violation of the Constitution, the Court ordered that UTN be merged into TSU. The plan of merger adopted by the Tennessee State Board of Regents pursuant to the Court's order provides for the merger of the two institutions by July 1, 1979. Both aspects of the District Court's judgment were affirmed by the Court of Appeals on April 13, 1979. The Court of Appeals and this Court have both denied Petitioner's applications for a stay of the merger.

2. **Parties**

The Petitioner is a body created by Tennessee State Statute for the purpose of coordinating the planning and financing of higher education in Tennessee. It has the duty and authority, *inter alia*, to approve all new academic programs at State universities and colleges and all requests for legislative appropriations for such universities and colleges. It has been a party defendant in this case since its inception. The other parties to this cause have been identified in the petition filed herein by the University of Tennessee, and these descriptions are incorporated herein by reference.

3. **The Proceedings Below**

The original complaint in this case was filed on May 21, 1968. On July 22, 1968, the United States of America filed a motion to intervene as Plaintiff, which was granted on July 22, 1968. On August 22, 1968, the District Court for the Middle District of Tennessee entered an order denying the Plaintiff's request for an injunction to prevent the physical expansion of UTN, but requiring the formulation of a State-wide desegregation plan for higher education in Tennessee. The Court found that racial requirements for admissions to State universities had

been abolished in 1960, that all State institutions of higher learning were pursuing open door admissions policies, and that State officials had not been guilty of Constitutionally impermissible acts in connection with the desegregation of higher institutions either presently or in the recent past. The Court held, however, that the racial enrollment statistics at the various institutions indicated that a dual system still existed and that, in particular, while "genuine progress" was being made to desegregate historically white institutions across the state "nothing has been done to dismantle effectively the dual system so graphically illustrated by the enrollment of Tennessee A & I University," which was then 99% black.

The Court denied the request for an injunction, on the basis that the proposed expansion of UTN "will not necessarily perpetuate a dual system of higher education." The Court found, in effect, that UTN was not in direct competition with TSU, because it was primarily a night school for "employed persons of all races". The Court ordered the state to submit a plan designed to effectuate desegregation of higher education in Tennessee, with particular attention to TSU.

On April 1, 1969, the Defendants filed a "Plan for Achieving Meaningful Desegregation of Public Colleges and Universities in Tennessee and for Abolishing the Dual System of Higher Education". In an order entered on December 23, 1969, the Court found that the plan was lacking in specificity and neither approved nor disapproved it. On April 1, 1970, and June 14, 1971, the Defendants filed progress reports with the Court describing their efforts to desegregate the system of higher education in Tennessee. On February 3, 1972, the District Court filed a further opinion and order reviewing the progress toward desegregation and ordering further desegregation efforts. The Court concluded that "with the exception of TSU, the Defendants are proceeding to dismantle their dual system of higher educa-

tion, taken as a state-wide whole, at a Constitutional permissible rate of speed . . . [A] continuance of present programs and policies would appear to satisfy Constitutional requirements as to these schools". The Court made a separate Constitutional finding with respect to TSU because of its continued black enrollment in excess of 99%:

> "The phenomenon of a black Tennessee state, as long as it exists, negates both the contention that the Defendants have dismantled the dual system of higher education in Tennessee, as ordered by this Court, and the contention that they are, in any realistic sense, on their way toward doing so . . . the Constitutional violation which the present racial composition of that institution constitutes is of a severe and egregious nature."

The Court ordered the Defendants to submit an integration plan for the 1972 academic year "which will insure in the opinion of the Defendants a substantial white presence" at TSU.

The Defendants subsequently formulated a long-range plan for the integration of the State-wide system, which was filed with the Court on July 31, 1974, and adopted specific programs designed to increase white enrollment at TSU. The long-range plan provided for the appointment of a committee to monitor the integration of faculty and students at all institutions on a recurrent basis. The integration efforts specifically directed at TSU focused upon competition for white students as between TSU and UTN. In order to reduce this competition, programs that were essentially duplicated at the two institutions were placed under joint administration, or were exclusively allocated to one institution or the other.

The evidentiary hearing which resulted in the appeal of this case to the Sixth Circuit Court of Appeals occurred from September 20 to October 20, 1976. In ruling upon the Defendants' compliance with Constitutional requirements, the Court again

considered the State-wide system and TSU separately. With respect to the State-wide system, the Court noted that there had been a steady increase of black students in predominately white universities, the State-wide percentage having increased from 9.5% in 1972 to 12.6% in 1975. The Court found that the long-range plan appeared to be "a promising step forward" which "under the careful supervision of the monitoring committee should result in further progress," and held that the Defendants were not in default of their Constitutional obligation with respect to the State-wide system.

The record showed that the percentage of black attendance at TSU had decreased from more than 99% in 1972 to approximately 85% in 1975. UTN had a 1975 enrollment of 86% white and 12.7% black. Although greater desegregation efforts had been made with respect to TSU than elsewhere, and although greater progress toward integration had occurred there than elsewhere, the Court held that the 85% black enrollment at TSU was "a vestige of *de jure* segregation" and represented a continuing Constitutional violation.

There was no finding that the Defendants had committed any act intended to impede TSU's desegregation, but the Court found that the "existence and expansion of UTN" had in fact impeded it, by perpetuating competition for white students between the two institutions. Noting that it had permitted UTN's expansion in its 1968 ruling on the basis that "the dual system would not necessarily be perpetuated" the Court, in effect, found that this prediction had proved to be inaccurate. The Court had previously found that "dualism" would not necessarily be perpetuated because UTN was almost exclusively an evening institution for employed persons. In the instant ruling, the Court did not find that this situation had changed, but found that the separate existence of UTN affected TSU's ability to desegregate, because it was necessary for TSU to attract working adult students "if it is to prosper". Thus, the competitive situa-

tion had not changed, but the Court's theory concerning that competition had.

In addressing the issue of remedy, the Court found that the "Defendants have sought to achieve orderly progress [toward desegregation] by joint and cooperative programs and exclusive programs" but that this approach "has not worked and has no prospect of working." The Court concluded that the only means of eliminating competition for white students between UTN and TSU, and thus of reducing the percentage of black enrollment at TSU, was the merger of UTN into TSU. Conceding that the remedy was "radical," the Court held that it was nonetheless appropriate, because the historic legalized exclusion of white students from TSU had been a "blatant" Constitutional violation. The Court ordered the Board of Regents to file a plan providing for the merger of UTN and TSU by July 1, 1980.

The Court of Appeals affirmed the ruling of the District Court, in a two to one decision rendered on April 13, 1979. The majority opinion generally followed the reasoning of the District Court, holding that the State had a Constitutional duty to dismantle the effects of *de jure* segregation by altering the predominately black enrollment at TSU. The Court acknowledged that there are important differences between a compulsory, homogeneous system of secondary education and a free choice, heterogeneous system of higher education, which (presumably) must be taken account of in the judicial process. The Court made no reference to these differences in discussing its holding, however, and the holding itself makes no allowances for them.

In upholding the judgment of the District Court, the majority relied largely upon *Green v. County School Board*, 391 U.S. 430, 88 S. Ct. 1689, 20 L.Ed.2d 716 (1968), in which the Supreme Court held that the adoption of a "freedom of choice" plan did not, under the facts of the case, discharge the State's duty to desegregate its public schools. The impression conveyed by the

majority opinion is that the State has the same Constitutional responsibility for free choice enrollment patterns in institutions of higher learning, as it has for pupil attendance patterns in primary and secondary schools.

The majority also rejected the appellants' argument that the merger remedy was inappropriate, in light of the Supreme Court holding in *Milliken v. Bradley*, 418 U.S. 717, 94 S. Ct. 3112, 41 L.Ed.2d 1069 (1974). The appellants argued that the predominate black enrollment at TSU was the result of TSU's historic identification as a black university; that UTN had not caused or materially contributed to this racial identification; that UTN itself was a fully integrated institution; and that the inter-system merger of UTN into TSU was analogous to the inter-district remedy imposed in *Milliken*, in that it sought to cure a Constitutional violation involving an entity which had not produced or contributed to the violation. The Court of Appeals distinguished *Milliken* on two grounds: (1) that *Milliken* involved the issue of local control over the educational process, whereas the present case does not; and (2) that UTN's expansion to a four-year, degree-granting institution made it more difficult for TSU to attract white students, and to that extent it contributed to the continuing predominate black enrollment at TSU. (With reference to this latter point, it should be emphasized that the District Court did not find that the expansion of UTN was done with segregative intent, or that it was a Constitutional violation. On the contrary, the Court's discussion of the competition between TSU and UTN was solely in terms of remedy: that merger was an appropriate remedy because it would eliminate competition for white students between the two institutions).

In his dissenting opinion, Judge Albert Engel expressed the view that the merger remedy violated the principle of *Milliken v. Bradley* because "it goes beyond the Constitutional wrong found to have been committed by the University of Tennessee

. . ." He observed that the predominately black enrollment at TSU is the result of student choices, motivated by the historic black identity of TSU; that the effective way to alter these choices is to eliminate TSU's black identity, primarily through further integration of TSU's faculty; and that it is wholly inappropriate to lay responsibility for TSU's enrollment pattern "at the doorstep" of UTN, which is itself a fully integrated institution. Judge Engel's opinion recognizes that judicial intervention into higher education must be limited by the need to preserve free student choice, and that free choice enrollment patterns cannot, of themselves, be treated as Constitutional violations:

> "In my opinion there is little that the courts, and for that matter the public institutions themselves, should do to discourage attendance at a state institution of higher learning by any applicant because of race. Nevertheless, the exercise of what ought to be a free and personal choice on the part of student applicants is itself treated somehow as the sufferance of a Constitutional violation by the institutions involved. . . . Obviously, there is much less that courts and institutions should or can in fact do in this area where attendance is voluntary. This fundamental difference between higher education and the compulsory nature of public education at the primary and secondary levels has been consistently recognized." (Citations omitted).

Although Judge Engel disagreed with the reasoning and holding of the majority opinion, he concluded that the University of Tennessee had a duty, under the circumstances, to refrain from expanding UTN so as to make it more competitive with TSU. He, therefore, proposed that the proper remedy would have been to remand the case to the District Court for the purpose of enjoining UTN from expanding its courses and activities beyond those in existence prior to 1969.

REASONS FOR GRANTING WRIT

I

The Need for Defining Standards Applicable to the Desegregation of Systems of Higher Education

Although some of the earliest desegregation decisions involved higher education, there has been a virtual decisional vacuum in this area over the past thirty years. The Supreme Court's early decisions established the basic premises that applicants may not be denied admission to public colleges and universities and may not be discriminated against after admission because of their race. *Sweatt v. Painter*, 339 U.S. 629 (1938) and *McLaurin v. Oklahoma*, 339 U.S. 637 (1950). The Court has declined subsequent opportunities to elaborate upon these holdings. Moreover, the Court has affirmed two lower court decisions which stated somewhat conflicting views as to the nature of the duty to desegregate in higher education. *Alabama State Teachers' Association v. Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968), aff'd. 393 U. S. 400 (1969); and *Norris v. State Council of Higher Education*, 327 F. Supp. 1368 (E.D. Va. 1971), aff'd. sub. nom. *Board of Visitors of the College of William and Mary in Virginia*, 404 U. S. 907 (1971). These affirmances were without opinion, and gave no indication as to which view, if either, was approved by the Court.

The *Alabama State* case was factually similar to the present case. The plaintiffs had sought an injunction to prevent Auburn University from constructing an extension school in Montgomery, Alabama, alleging that the school would attract white students who might otherwise have attended predominately black Alabama State Teachers College, also located in Montgomery. The Court denied the injunction, holding that "the basic requirement of the implementation of the affirmative duty

to dismantle the dual system on the college level" is met by the implementation of good faith open admissions and employment policies.

The plaintiffs argued that the case was analogous to post *de jure* public school cases, in which the persistence of segregated attendance patterns in a school system formerly segregated by law is held to impose a duty upon the School Board to "dismantle" the "vestiges" of such legalized segregation by modifying pupil assignment plans. They asserted that open admissions policies on the college were no more Constitutionally adequate for "dismantlement" purposes than freedom of choice plans in public school systems, such as those involved in *Green v. County School Board of New Kent County of Virginia,* 391 U. S. 430 (1968).

The Court held, however, that the duty to dismantle a segregated public school system is fundamentally different from the duty to dismantle a segregated system of higher education, because public and higher education are, themselves, fundamentally different. Public school attendance is compulsory and is usually directed by student assignment plans, and public schools are basically similar to one another. Thus, judicial decisions that change or affect student attendance patterns do not involve the Court in educational policy-making:

> "[I]n principle at least, one school for a given grade is substantially similar to another in terms of goals, facilities, course offerings, teacher training and salaries, and so forth. In this context, although reluctant to intervene, when the Constitution and mandates from the higher courts demanded it, we felt that desegregation could be accomplished and that the requirements of the law would be met without our being involved in a wide range of purely educational policy decisions."
>
> 289 F. Supp. at 788.

On the other hand, systems of higher education are non-compulsory, and are intended to provide students with a variety of dissimilar institutions from which to choose.[1] Judicial decisions designed to change segregated enrollment patterns by changing the institutional choices open to students would necessarily involve the Court in educational policy-making:

> "Higher education is neither free nor compulsory. Students choose which, if any, institutions they will attend. In making that choice they face the full range of diversity in goals, facilities, equipment, course offerings, teacher training, and salary and living arrangements, perhaps only to mention a few. From where legislatures sit, of course, the system must be viewed on a statewide basis. In deciding to open a new institution or build a branch or expand an existing institution, and in deciding where to locate it, the legislature must consider a very complicated pattern of demand for and availability of the above listed variances, including also impact on the dual system. We conclude that in reviewing such a decision to determine whether it maximized desegregation we would necessarily be involved, consciously or by default, in a wide range of educational policy decisions in which courts should not become involved."
>
> 289 F. Supp. at 788.

The Court acknowledged that there was some similarity between open admission policies at the college level and freedom of choice plans in public school systems, but held that the Supreme Court decisions holding public school freedom of choice plans Constitutionally inadequate did not apply to free choice systems of higher education:

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[1] As succinctly stated by UTN's Acting Chancellor Charles Smith during the trial of this case, systems of higher education are not intended to serve as chains of "Holiday Inns of the mind."

"We are . . . cognizant that recent Supreme Court decisions have cast doubt on the continued viability of freedom of choice in the public schools, but we do not interpret those decisions as applying to the operation of an educational system on the college level. Freedom to choose where one will attend college, unlike choosing one's elementary or secondary public school, has a long tradition and helps to perform an important function, viz. fitting the right school to the right student."

289 F. Supp. at 790.

On appeal, a majority of the Supreme Court affirmed the District Court decision, without opinion, 383 U. S. 400, 21 L. Ed. 2d 631 (1969). Justice Douglas wrote a dissenting opinion, rejecting the notion that "a line" should be drawn "between elementary and secondary schools on the one hand and colleges and universities on the other," and suggesting that the holdings in the freedom of choice cases should be applied to open admission policies at the college level.

The *Norris* decision reaches a result that is reconcilable with the *Alabama State* holding, but seems to reject some of the *Alabama State* reasoning. The *Norris* plaintiffs had brought an action to enjoin Richard Bland College in Petersburg, Virginia, from being escalated from a two to a four-year institution, and to require a merger between Richard Bland and Virginia State University, also located in Petersburg. Richard Bland had been established in 1960 as a branch of the College of William and Mary. It was an almost totally white institution, with less than 2% black enrollment and no black faculty. Until the year prior to the Court's decision, its catalog did not state that it was open to students of all races. At the time of the Court's decision, Virginia State was an almost totally black university, having a white enrollment of approximately 2.5%. The plaintiffs asserted that the statute authorizing the escalation of this institution to

four-year status was unconstitutional because it had the purpose and effect of attracting white students away from Virginia State, thus impeding Virginia State's efforts to desegregate. They further asserted that Richard Bland should be merged into Virginia State as a means of dismantling Virginia's dual system of higher education.

The Court agreed that the escalation was segregative in purpose and effect, and declared the authorizing statute invalid. The Court declined to order a merger of the two institutions.

The *Norris* holding is reconcilable with the holding in the *Alabama State* case and with the Defendants' position in the present case. *Norris* did not merely involve the dismantlement of a dual system of higher education, initiated by historic segregation laws and carried forward in private racial enrollment choices. It involved the intended commission of an official act —i.e., the escalation of Richard Bland College to four-year status—which the Court found had as its "*purpose* and effect" the impeding of desegregation. No such purposeful acts of segregation were present in the *Alabama State* case, and none are present here.

The *Norris* opinion distinguishes *Alabama State*, largely in terms of segregative intent. The Court noted that, whereas Auburn University had been making good faith efforts to integrate, Richard Bland College "already has a ten-year history of an all-white faculty and a virtually all-white student body." This distinction would apply to the present case as well, since UTN is unarguably an integrated institution. The *Norris* court nonetheless indicated some disagreement with the reasoning in *Alabama State*, stating that it could not "subscribe to the proposition that the Supreme Court represented in a one sentence memorandum decision that it approved every statement in the [*Alabama State*] court's opinion." A dissenting opinion was filed which relied heavily upon the *Alabama State* opinion in arguing that the State's duty to desegregate had been satisfied.

The Supreme Court's affirmance of the *Norris* decision did not clarify the applicable Constitutional principles, since it was, again, an affirmance without opinion.

The present case illustrates the need for defining the duty to desegregate in higher education. Except for Judge Engel's dissenting opinion, the Courts below treated this case as essentially another "school" desegregation case, giving little recognition to the basic institutional differences between public school systems and higher educational systems. The fact that both systems provide the same service—education—has been permitted to obscure dissimilarities of Constitutional significance. As a result, the Courts have crossed an important Constitutional boundary in deciding this case, without clearly acknowledging that they have done so.

The boundary is, of course, that which separates compulsory activities from free choice activities. Given the element of private choice, college enrollment patterns cannot conceivably have the same Constitutional significance as student attendance patterns in public schools. Yet, the Courts below appeared to make no distinction whatever in this regard. The District Court and the Court of Appeals both held that the persistence of a predominately black enrollment pattern at TSU was, in itself, a vestige of *de jure* segregation which the State had a continuing duty to "dismantle." As Judge Engel noted, "the exercise of what ought to be a free and personal choice on the part of student applicants is itself treated somehow as the sufferance of a Constitutional violation by the institutions involved."

If this is the principle the majority intended to adopt, it is, as we will presently argue, both illogical and unworkable. The decisions below point up, more than anything else, the need for stating comprehensible standards for the desegregation of higher education. It is respectfully submitted that this case presents an appropriate opportunity for such explication.

II

The Holding in the Instant Case, That the Persistence of a Predominately Black Enrollment at a Single Historically Black University Demonstrates a Continuing Constitutional Violation, Is Constitutionally Unsound, and Is Contrary to Previous Pronouncements of This Court.

The Courts below held that the predominately black enrollment at TSU was a "vestige" of *de jure* segregation, which the State has a Constitutional duty to eliminate, and that its failure to eliminate it constitutes a continuing Constitutional violation. Stated in less legalistic terms, the holding was: (1) That the State is responsible for present-day enrollment choices which produce the predominately black enrollment at TSU, because those choices are racially-conditioned by the historic legalized segregation of TSU and (2) That the continued existence of a single predominately black state university is Constitutionally unacceptable. The Petitioner asserts that both of these propositions are unsound and contrary to previous pronouncements of this Court:

1. Segregated free choice enrollment as a "vestige" of de jure segregation for which the State is Constitutionally responsible.

Ordinarily, segregation produced by private choice does not constitute or evidence a Constitutional violation by the State. *Swann v. Charlotte-Mecklenburg School Board*, 402 U.S. 1, 23 (1971); *Cf. Washington v. Davis*, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race"). This is true even though many—perhaps most—of the attitudes which produce such choices are conditioned by historic *de jure* segregation. Even in the area of public school desegregation, this Court has indi-

cated that the State cannot be held responsible for segregation that results from private prejudice:

> "Our objective in dealing with the issues presented by these cases is to see that State authorities exclude no pupil of a racial minority from a school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools."
>
> *Swann v. Charlotte-Mecklenburg School Board*, 402 U.S. 1, 23, 91 S. Ct. 1267, 1279, 28 L.Ed.2d 554, 570 (1971).

Thus, the Court has held that the State is not Constitutionally responsible for resegregation of schools, produced by private racially-motivated decisions to move away from integrated schools. *Swann, supra*, at 31.

The Court has also stated that "at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention." *Keyes v. School District No. 1*, 413 U.S. 189, 211 (1973). Whatever the Court had in mind in referring to the "attenuation" of cause from effect, it was speaking within the context of public school systems where there is governmental control over pupil assignment at both ends of the causal chain. The linking of attendance choices in 1977 to governmental actions prior to 1960, via the connecting chain of private racial attitudes, would seem to exceed whatever standard of "attenuation" the Court may have had in mind.

In treating racially motivated private choices as "vestiges" of *de jure* segregation, which the State is required to eliminate, the Circuit Court has extended the definition of Constitutional duty beyond previously existing limits, and beyond the limits

of logical application. It has, moreover, posed a dilemma for State governments, by giving them legal responsibility for enrollment results they cannot and should not control. On the public school level, a results-oriented test of Constitutionality is appropriate, because the State has direct control over results. Whatever the practical difficulties, students *can* be assigned so as to approximately produce given racial patterns. Moreover, once the desired result is achieved, the State's Constitutional duty is fully and finally performed, even though resegregation occurs through private action. *Swann, supra*, at 31. This is not true when a results-oriented standard is applied to a higher educational system—as this case amply demonstrates. The Court has, in effect, held that the State of Tennessee will be in violation of its Constitutional duty so long as TSU is predominately black. Yet, it is clear that, given a free choice system of enrollment, the State cannot determine TSU's enrollment. There is, for example, no assurance that even the merger of TSU and UTN will end this litigation. If the merged institution resegregates by white flight to surrounding institutions, the Circuit Court's reasoning would apparently permit—perhaps require—a further finding of Constitutional violation, and an additional remedy, further restricting enrollment choices. The Petitioner respectfully submits that this cannot and should not be the law.

2. The holding that the existence of a single predominately black institution is a per se violation of the Constitution.

Even if racial percentages in enrollment were, *per se*, a proper test of the State's fulfillment of its Constitutional duty, the existence of an 85% black enrollment at TSU would be insufficient, under the prior decisions of this Court, to establish a default of that duty. Even in secondary school cases, the Supreme Court has repeatedly held that the existence of a small

number of black schools does not in itself establish that the State has failed to fulfill its Constitutional duty:

> ". . . it should be clear that the existence of some small number of one-race or virtually one-race schools within a district is not in and of itself the mark of a system that still practices segregation by law."
>
> *Swann v. Charlotte-Mecklenburg School Board*, 402 U.S. 1, 23, 91 S. Ct. 1267, 1279, 28 L.Ed.2d 554, 570 (1971); See also, *Keyes v. School District No. 1*, 413 U.S. 189, 93 S. Ct. 2686, 37 L.Ed.2d 548 (1973); *Austin Independent School District v. United States*, 429 U.S. 990, 97 S. Ct. 517, 50 L.Ed.2d 603 (1976).

The existence of a small number of one-race schools at the secondary level is treated as only symptomatic of a segregated system. Their existence imposes a burden upon the State to show that the system as a whole is in fact desegregated. If the State is able to show that its current attendance plan does not carry forward historic legalized segregation, and that one-race schools are not being preserved by State action, its Constitutional duty is fulfilled, notwithstanding the persistence of some one-race schools in the system. *Swann, supra*, at 23.

If a *per se* rule cannot be applied to the continued existence of one-race schools at the secondary level, clearly such a rule is inappropriate when applied to higher education. Diversity in higher education means cultural as well as academic diversity, and may include the preservation of identifiably black universities. See *Adams v. Richardson*, 480 F.2d 1159, 1165 (D.C. Cir. 1973): ("Black institutions currently fulfill a crucial need and will continue to play an important role in black higher education"). and *Note, The Affirmative Duty to Integrate in Higher Education*, 79 *Yale Law Journal* 666 (1970):

> "The problem of integration in higher education is complicated by the fact that it is increasingly apparent that the Negro colleges have an important part to play in erasing the stigma of inferiority which decades of legal segregation has produced in many black children. These colleges by necessity have filled the role of the Fordhams, the Brandeises and Notre Dames of other ethnic minorities; they have prevented the assimilative death of Afro-American culture and have preserved 'an identity beyond color that is cultural.' "
>
> "The *Brown* mandate for higher education might be interpreted as *Green* defined it for elementary and secondary education: the state is required to achieve immediately a unitary non-racial system of higher education. . . . By abolishing these fragile 'qualities which are incapable of objective measurement,' such a system would extinguish the traditional values of the black colleges as curators of Afro-American culture; this would frustrate the wishes of many black students who wish to attend these colleges because they view them as a means of counteracting the lingering stigma of racial discrimination."
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> 79 *Yale Law Journal, supra*, at 676, 677.

Moreover, the factual narrowness of the Court's holding creates doubt as to its applicability to other fact situations. When Constitutional compliance is measured by the nature and extent of the State's efforts to desegregate, or by system-wide enrollment patterns, there can be some general understanding of what is required. Such is not the case when, as here, compliance is measured by the enrollment at a single institution. If an 85% black enrollment is unconstitutional, at what point are Constitutional requirements met? Must all institutions of higher learning be predominately white? If not, at what point does black enrollment become unconstitutionally high? If so, how can such a rule possibly be reconciled with—let alone be supported by—the principle of Equal Protection?

III

The Remedy Imposed in This Case, Requiring the Merger of a Fully Integrated Institution Into a Segregated Institution in Order to Change the Racial Composition of the Latter, Is Contrary to the Holding in Milliken v. Bradley, 418 U.S. 717, 94 S. Ct. 3112, 41 L.Ed.2d 1069 (1974)

This Court has firmly and repeatedly held that the remedy in desegregation cases must fit the Constitutional violation. In *Milliken v. Bradley*, 418 U.S. 717, 94 S. Ct. 3112, 41 L.Ed. 2d 1069 (1974), this Court reversed a decision of the Sixth Circuit Court of Appeals, permitting an inter-district remedy for desegregation of Detroit's inner-city schools. Although the suburban districts were not found to have caused the segregation of the Detroit schools, they were included within the remedy because Detroit itself did have sufficient white students to achieve desegregation. The Supreme Court reversed, on the basis that the remedy did not fit the violation: "More specifically, the white school districts, as separate governmental entities, could not properly be included within the remedy because they were not found to have caused the violation." *Milliken, supra*, at 747.

The facts of the present case are analogous. The Constitutional violation found by the District Court was the historic establishment of TSU as a *de jure* black institution. UTN was not found to have caused or participated in this violation. It was, however, included within the merger remedy because, like the suburban school districts in *Milliken*, it has a pool of white students to contribute to the entity (i.e., TSU) found to be segregated. In the words of Judge Engel:

> "The majority opinion speaks repeatedly in one form or another of the failure of all previous efforts on the part of the parties to 'remove the vestiges of state-imposed segregation.' . . . What it really means is that the state has never succeeded in obtaining racially balanced faculty at TSU, nor either has it persuaded black applicants for admission to TSU to attend other schools which are now open to them or conversely has it persuaded potential white college students to attend TSU. The reasons for this are somehow all laid at the door of UT, even though the court has found that UT itself has been satisfactorily integrating its faculty, staff and student body, and that in fact, its composition and its racial balance are becoming representative of the racial balance of the State as a whole . . . UT-N is being ordered to transfer its property to a school which is not integrated in the hope that somehow that action will solve the problem. In truth, the problem lies in other factors."

The Plaintiffs have contended that the analogy to *Milliken* is not appropriate, because UTN is part of a statewide system that has historically engaged in *de jure* segregation. This contention is similar to the contention of the dissenting Justices in *Milliken*, that the suburban school districts were chargeable with the acts of *de jure* segregation by State agencies. Indeed, the main distinction is that the violations referred to by the present Plaintiffs ceased nineteen years ago, while those involved in *Milliken* were current. In any case, the *Milliken* court very clearly holds that the educational entities subjected to the remedy must, *themselves*, be found to have contributed to the segregative condition complained of. There was no such finding in this case with respect to UTN. The District Court identified the act of *de jure* segregation necessitating the merger remedy as the historic founding of TSU as a Black university. It was the historic exclusion of Whites from Tennessee State, leading to its identification as a Black university, and the consequent reluctance of White students to attend it after racial bars were lifted, that constituted the alleged violation. UTN was not found to have participated in this process, either presently or historically, and it is difficult to imagine how it could have done so.

The judicial invasion of the political and policy-making domain in this case is, in some respects, even more severe than in *Milliken*. As in *Milliken*, the Court has declared a major restructuring of the governmental and administrative make-up of the entities involved. It has decreed that the facilities and personnel at what is now UTN shall be placed under the control of an administration and governing system other than the one that was operating it when it was planned and funded by the Legislature. It has revoked the political and educational policy decision to operate UTN as a specialized institution, having as its only priority the education of primarily part-time and adult students in evening classes. It has determined that the curricula formerly approved to be administered by the UTN administration and faculty shall be administered by the TSU administration and such faculty as it chooses to hire.

If the making of such policy decisions is judicially inappropriate in a public school system such as Detroit's, it is far more so in a system of higher education. As Judge Johnson observed in the *Alabama State* case, judicial decisions affecting public school systems tend to be less sharply policy-oriented than those affecting higher education, because the educational role of all public schools is fundamentally the same. The present decision illustrates precisely the kind of judicial policy-making the *Alabama State* court warned against. If it is inappropriate to deprive local school boards of curricula-making authority in a public school system that is teaching essentially the same academic fundamentals in each school,[2] how much less appropriate is it to abolish a specialized institution of higher learning, created for a particular purpose and as part of a given governing system, and to transfer its entire curricula, personnel, and physical facilities to a general-purpose university, operating under an entirely different governing system?[3]

[2] One of the aspects of the consolidation remedy in *Milliken* that concerned the Supreme Court was that local boards currently had discretion over a *portion* of school curricula, and the consolidation would place that discretion with a body that had not been legislatively given it. 418 U.S. at 743.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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[3] The extent to which the Court entered the educational policy domain can be seen by comparing the testimony of Charles Smith, Acting Chancellor of UTN, concerning the value of maintaining UTN as a separate specialized institution, with the contrary testimony of Sterling Adams, Assistant to the President of TSU and one of the Plaintiffs in the case. Charles Smith made a persuasive statement in support of maintaining an institution whose sole priority is the education of night-time, primarily adult students. He pointed out that there are fundamental differences between teaching this type of student and teaching full-time, college age undergraduate students, and that the faculty and administration of UTN was uniquely geared to serving the former. Sterling Adams, on the other hand, spoke of the advantages of combining the resources of UTN and TSU so as to provide a "cross-fertilization" of disciplines within a single institution. Charles Smith Testimony Vol. I, pp. 2256-2262. Sterling Adams Testimony Vol. II, p. 508. By creating and maintaining UTN as a separate institution the State Legislature has, in effect, adopted the educational theory advocated by Charles Smith. By requiring the merger of the two institutions, the District Court has overruled that legislative decision, and has made the contrary theory advocated by Sterling Adams a reality.

Certificate of Service

I hereby certify that a copy of the foregoing petition has been mailed this 11 day of July, 1979, to the following counsel:

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APPENDIX

APPENDIX A

No. 77-1622
No. 77-1624

United States Court of Appeals
For the Sixth Circuit

Raymond Richardson, Jr., et al.,
Intervening Plaintiffs-Appellants,
United States of America,
Intervening Plaintiff-Appellee,

v.

Ray Blanton, Governor of the State of Tennessee, et al.,
Defendants-Appellees,
University of Tennessee, et al.,
Defendants-Appellees,
Tennessee Higher Education Commission,
Defendant-Appellee,
State Board of Regents,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Tennessee

Decided and Filed April 13, 1979

Before: Lively and Engle, Circuit Judges, and Peck, Senior Circuit Judge.

Lively, Circuit Judge. These consolidated appeals are from a judgment and order in litigation seeking desegregation of public higher education in Tennessee. The background and a description of the litigation may be found in this court's

opinion in *Geier v. University of Tennessee*, Nos. 77-1621, 77-1623 and 77-1625 decided and filed April 13, 1979. The plaintiffs-appellants Richardson et al. appeal from that portion of the district court's final judgment which approved the "long range plan" of the defendants insofar as it deals with desegregation of public institutions of higher education in Tennessee outside the metropolitan Nashville area. The same parties appeal from an order entered by the district court on July 22, 1977 in which the court denied motions to conduct hearings on objections to a plan for merger of two Nashville institutions, Tennessee State University (TSU) and the Nashville branch of the University of Tennessee (UT-N).

I

The order of July 22, 1977 is affirmed. As we pointed out in *Geier v. University of Tennessee, supra,* the district court held that the Nashville merger plan did not violate its judgment ordering the formulation of a plan. This conclusion has not been shown to be erroneous. Though the appeals in this case and in *Geier v. University of Tennessee* were expedited, because of the congestion of our docket and the necessity to grant priority to many other appeals,[1] nearly two years have passed since the judgment was entered in this case. During that time the formulation and implementation of the plan of merger for TSU and UT-N have gone forward. Any objections to the merger plan may be presented to the district court following issuance of the mandates in this case and in *Geier v. University of Tennessee.*

Further, we do not consider the issue which the appellants have attempted to raise with respect to an alleged effort to oust the president of TSU. This matter was raised by an affidavit of a non-party filed after entry of the judgment and

[1] Over the years priorities have been established by Congress which require the advancement of certain categories of appeals. There are presently more than twenty priority categories.

notices of appeal and is not part of the record before us. The district court retained jurisdiction for the purpose of enforcing its previous orders in this case, and any claims that the defendants are failing to carry out those orders in good faith should be presented to the district court in the first instance.

II

In *Geier v. University of Tennessee* we held that the district court did not exceed its equitable power or abuse its discretion in ordering the merger of TSU and UT-N. In this appeal we are primarily concerned with the validity of the provisions for statewide desegregation contained in the long range plan. The appellants contend that the district court committed reversible error in failing to evaluate the specific goals and policies of the statewide features of the long range plan. They also argue that the plan dooms statewide desegregation by leaving its implementation in the hands of the defendants. In a supplemental brief and at oral argument of the appellants urged the court to bring the U.S. Department of Health, Education and Welfare (HEW) into this case. It is not specified exactly to what extent HEW would be involved, except that its revised guidelines are urged upon us as creating minimum criteria for desegregation of public higher education.

A

The district court found that the long range plan, as it applied statewide outside Nashville, "appears to be a promising step forward, and under careful supervision of the Monitoring Committee, should result in future progress." *Geier v. Blanton,* 427 F.Supp. 644, 661 (M.D. Tenn. 1977). The appellants argue that it is not necessary that we hold this finding clearly erroneous in order to reverse the judgment of the district court. They contend that if the district court had subjected the long range plan to a more "refined analysis" it would have concluded that much of the progress in desegregation claimed

by the defendants was illusory and that the constitutional duty to dismantle the dual system of public higher education in Tennessee would not be achieved in a reasonable time under the long range plan. More specifically the appellants contend that "revised criteria" published by HEW should be applied in Tennessee. Though the revised criteria were not issued until a year after the judgment was entered in this case, they were published in the Federal Register (43 Fed. Reg. 6658) on February 15, 1978 and we take judicial notice of their contents.

B

The long range plan, filed in July 1974, was prepared by a committee of representatives from the Board of Trustees of the University of Tennessee (UT Board), the Board of Regents, State University and Community College System of Tennessee (SBR) and the Tennessee Higher Education Commission (THEC). The committee was assisted by a bi-racial consultant panel of experts in education administration. It is stated in the introduction to the plan that the statewide goals "are statements of what ought to happen to bring about a fully desegregated system of public higher education in a situation where students will remain free to choose the institution they will attend, or even if they will choose to go to college at all." The introduction emphasizes that the goals are more than mere projections of past trends, the additional element is "evaluations of the impact of various actions which defendants can take to affect enrollment, and faculty employment to see if they are achievable . . ."

The plan sets out separate goals of black student enrollment to be attained by 1975 and 1980 for the community colleges, the universities under control of SBR and the University of Tennessee. The goals for the SBR universities are stated both with TSU included and excluded. These goals were summarized in a chart which also showed actual black enrollments for 1969 and 1973. The chart is reproduced here:

ACTUAL AND PROJECTED DEGREE CREDIT HEADCOUNT ENROLLMENT OF BLACK STUDENTS IN TENNESSEE'S PUBLIC COLLEGES AND UNIVERSITIES FOR SELECTED YEARS, 1969-80

	ACTUAL						PROJECTED					
	1969		1973		1975		1980					
	Black Enrollment	% of Total Enrollment	Black Enrollment	% of Total Enrollment	Black Enrollment	% of Total Enrollment	Black Enrollment	% of Total Enrollment
Community Colleges	398	7.44	2,387	16.0	3,515	19.1	5,744	23.2
Regents Universities								
Excluding TSU	2,354	5.44	3,446	6.8	4,286	8.0	5,534	9.6
Including TSU	6,853	14.34	7,581	13.8	8,597	14.8	9,614	15.4
Total Regents System								
Excluding TSU	2,752	6.03	5,833	8.08	7,801	10.9	11,278	13.7
Including TSU	7,251	13.99	9,968	14.2	12,112	15.8	15,358	17.6
University of Tenn.	1,117	3.2	2,200	5.1	3,151	6.7	4,975	9.2
Total Excluding TSU	3,869	4.62	8,033	7.1	10,952	9.2	16,253	11.9
Grand Total	8,368	9.47	12,168	10.74	15,263	12.4	20,333	14.4

If the goals are achieved the gap between black student enrollment and the black population of college age will be reduced from 5 per cent in 1973 to between 1.2 and 2.7 per cent in 1980. In the community colleges and the regents system, including TSU, the percentage of black students will exceed the proportion of the population who are black and of college age.

In preparing the plan the committee did not set a single goal, applicable to all institutions. The committee recognized that many of the institutions draw large numbers of students from nearby counties and that the black population of Tennessee is not evenly distributed throughout the State. The distribution of the black population of Tennessee was considered along with the "drawing area" of each school. It was felt that statewide desegregation would be achieved if each institution enrolled black students in approximate proportion to the black population of its service area.

The long range plan set statewide goals for black faculty and staff of 5 per cent by 1975 and 8.2 per cent by 1980. The committee noted that a recent survey of the American Council on Education had determined that only 3 per cent of the faculty and staff of American institutions of higher education were black. Again, different goals were assigned to the various institutions rather than a single goal applicable to all. These goals are summarized in the following chart, which was included in the plan.

ACTUAL AND PROJECTED DEGREE CREDIT HEADCOUNT ENROLLMENT OF BLACK STUDENTS IN TENNESSEE'S PUBLIC COLLEGES AND UNIVERSITIES FOR SELECTED YEARS, 1969-80

	ACTUAL						PROJECTED					
	Fall 1969			Fall 1973			Fall 1975			Fall 1980		
	Total	Black	% Black	Total	Black	% Black	Total	Black	% Black	Total	Black	% Black
Com. Col.	236	4.5	1.9	609.2	32.4	5.3	665.7	48.9	7.3	909.7	89.6	9.8
Reg. Univ.												
W/ TSU	2,220	253.3	11.4	2,671.8	231.7	8.7	2,939.1	274.7	9.3	3,152.4	328.3	10.4
W/out TSU	1,936	13.3	0.7	2,363.2	33.5	1.4	2,640.2	61.9	2.3	2,838.7	149.0	5.3
UT	2,033	20.5	1.0	2,598.0	51.1	2.0	2,724.0	92.0	3.4	2,975.0	164.0	5.5
Total												
W/TSU	4,489	278.3	6.2	5,879.0	315.2	5.7	6,328.8	415.6	6.6	7,037.1	501.9	8.2
W/out TSU	4,205	38.3	0.9	5,570.4	117.0	2.1	6,029.9	202.8	3.4	6,723.4	402.6	6.0

In addition to setting goals for the desegregation of student bodies, faculty and staff of the public institutions of higher learning, the long range plan establishes a monitoring system. A continuing desegregation committee (the monitoring committee) is charged with the following responsibilities:

> (1) to conduct an annual review of desegregation progress statewide and at each institution and report the results to the district court by November 15th of each year;
>
> (2) to make recommendations to the UT Board, SBR and THEC of needed additions or changes in the desegregation plan; and
>
> (3) to make further studies or collect additional information necessary to monitor the progress in achieving the desegregation goals specified in the plan.

The composition of the monitoring committee is bi-racial and consists of the chief executive and three members each of the UT Board, SBR and THEC.

C

The appellants dispute the district court's finding that "the steady increase in black enrollment at the predominantly white institutions has continued." 427 F.Supp. at 650. The court made this finding on the basis of the first desegregation progress report which the monitoring committee filed in February 1976. It is the position of the appellants that the overall increase in the number of black students has not resulted in a significant decrease in the effects of the dual system. This is so, they say, because a disproportionate number of the black students are concentrated in a few institutions while white students are almost equally divided among community colleges, SBR universities and the various campuses of the University of Tennessee. Further, it is clear that the traditionally white graduate schools —particularly schools of law and medicine—remain overwhelmingly white.

With regard to desegregation of faculties the appellants again dispute the finding of the district court that there was "a small, but steady, increase" in the progression of black faculty between 1969 and 1975. 427 F.Supp. at 651. The appellants maintain that most of the traditionally white universities have few black faculty members and that the increases have taken place largely at a few institutions, most notably Shelby State Community College, a Memphis institution with a large black student body. It is also pointed out that several of the traditionally white universities have hired former TSU black faculty members, resulting in no net gain in the number of black faculty statewide. The appellants also contend that virtually no progress has been made in desegregating the administrative staffs of the various institutions and the non-institutional administrative personnel of the two governing boards and THEC.

In addition to disputing the finding of past progress the appellants sharply criticize the plans for future desegregation. The approach is labeled "non-comprehensive and non-systematised" and the goals are said to be "too low and too distant." One complaint is that there is no centralized body with enforcement powers and that the monitoring committee has no real power, no staff and a minimal budget. The appellants also argue that the plan is deficient for lack of a commitment to scholarship funds for black students and for lack of a requirement that the institutions report to the court on their retention of black students.

The appellants say that the district court would have discovered these defects if it had undertaken to evaluate the specific goals and policies rather than making a generalized finding that the long range plan is adequate. It is their position that the district court did not carefully consider all the evidence before it and that it abdicated its responsibility to supervise desegregation by delegating the function to the monitoring committee.

D

The United States did not appeal. It notes in its brief as an appellee that the percentages of black student enrollment at all state institutions more than doubled between 1969 and 1975 and urges affirmance of the judgment insofar as it holds that desegregation of students is progressing at a constitutionally acceptable rate. The United States also concludes that the student goals for each institution under the long range plan are based on valid formulas and are acceptable, and agrees with the finding of the district court that the monitoring committee can supervise implementation of the plan adequately by exercising careful supervision.

The United States questions the judgment in one respect only. It urges us to vacate that portion of the judgment finding the long range goals for faculty desegregation to be adequate. It argues that the district court failed to make findings on undisputed evidence that a disparity exists between salaries paid to black and white faculty members at all traditionally white institutions. Since the defendants contend that Tennessee was in a difficult competitive situation in attempting to attract qualified black faculty members, it is argued that lower salaries paid to black teachers may account for this difficulty in hiring. The United States also concludes that the district court did not consider the fact that a disproportionate number of black faculty are employed at community colleges and that much of the improvement in desegregation of faculties at traditionally white universities has resulted from the movement of teachers from TSU to other institutions.

E

The State appellees seek to support the district court's judgment in several ways. They point out that the long range plan directs employment of a number of strategies to achieve desegregation in addition to setting numerical goals. One result of this

requirement is that an affirmative action policy was adopted by SBR and each of its institutions was directed to do the same. The progress report contains evidence of genuine efforts by all institutions to achieve the goal of statewide desegregation, they assert.

More specifically the appellees rely on the facts, as shown in the progress report, that the percentage of black freshmen enrolled at all institutions in the fall of 1975 exceeded the percentage of black persons in the Tennessee population. It is also argued that steady progress has continued in the effort to increase the number and proportion of black faculty members throughout the public higher education system. The claim of appellants and the United States that there was undisputed evidence of salary disparities which the district court failed to consider is challenged. The witness who testified to this effect admitted on cross-examination that in making his analysis of comparative salaries he did not consider time in academic rank, performance grading, publication and research activities and the places from which advance degrees were obtained. The appellees take the position that the district court was permitted to weigh this testimony as any other, and was not required to accept the conclusions of the witness.

III

The district court's approach to the statewide aspects of the long range plan must be viewed in proper perspective. From the beginning of this litigation the district court looked upon the situation in Nashville involving TSU and UT-N as "the heart" of the problem of segregated public higher education in Tennessee. The court and the original plaintiffs proceeded on the premise that the essential first step in achieving a unitary system must occur in Nashville. *Sanders v. Ellington*, 288 F. Supp. 937, 942-43 (M.D. Tenn. 1968). There had been virtually no progress by 1968 in desegregating TSU, and the ex-

pansion of UT-N ultimately was found to be a deterrent to any hope of attracting a white presence to TSU. *Geier v. Blanton, supra,* 427 F.Supp. at 652-53. At the same time that TSU remained overwhelmingly black many of the traditionally white institutions were making some progress in desegregating their faculties and student bodies. Thus, while the rest of the system was not ignored, the focus of the court was clearly on Nashville. Nevertheless, when a situation outside Nashville which threatened the progress of desegregation was brought to the court's attention, it acted with dispatch. On June 20, 1973 the district court, in the present case on the motion of appellants herein, enjoined construction of a community college campus in a predominantly white section of Shelby County and directed that a mid-town Memphis campus be developed first. The court found that the prospects were good for a reasonable racial balance in the student body at the mid-town site whereas a school at the old county penal farm would be overwhelmingly white.

The approach of the district court to this complicated case was to require steady progress statewide while concentrating on the areas where local conditions or actions presented identifiable obstacles to the required dismantling of Tennessee's dual system of public higher education. This was a reasonable procedure.

In determining that the long range plan was constitutionally adequate Judge Gray had before him the desegregation progress report filed February 15, 1976 and the minutes of the monitoring committee as well as the testimony and documentary evidence received at the trial. The progress report disclosed continued progress toward a more balanced distribution of black students. Approximately 60 per cent of the increase in black students from 1974 to 1975 was recorded at institutions other than TSU and Shelby State Community College which had the largest concentrations of black students. The progress report and monitoring committee minutes showed that the long range

plan was not static. The goals ultimately adopted for black enrollment in the fall of 1975 exceeded those of the original plan as the result of adoption of "revised equal access goals."

Less success was reported in efforts to desegregate faculties and staff. The progress report noted a better distribution of black faculty from 1974 to 1975, but concluded that it is difficult to formulate realistic goals for black faculty and staff because of the intense national compensation for a relatively small number of qualified black candidates. In this area "action steps" were adopted which included a program to aid faculty members lacking terminal degrees to complete their studies.

The progress report recognized that the increased numbers of black freshmen would require greater attention to problems of retention if the purposes of the plan were to be achieved. The report acknowledged that the best results were being achieved at the undergraduate level, but noted some progress in desegregating graduate schools other than law schools. The institutions under the SBR made the most consistent progress achieving the interim goals for that system in all areas—student, faculty, institutional and non-institutional staff. Some progress in all areas was noted in the University of Tennessee system and the report pointed out that the desegregation goals for the UT system had been revised upward. The report concluded with a statement of the requirement that a "desegregation impact assessment" be made before changes could be made by a governing board in the following areas: (a) academic programs; (b) polices or requirements related to admissions, retention or graduation; (c) student financial assistance programs; (d) decisions involving the construction, closing or combining campuses and establishment of new institutions and cooperative programs.

IV

In *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 417-18 (1977), the Supreme Court set forth the role of a

court of appeals in reviewing the judgment of a district court in a desegregation case as follows:

> On appeal, the task of a court of appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the district court are clearly erroneous, it may set them aside under Fed. Rule Civ. Proc. 52(a). If it decides that the district court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors.

It is apparent from our study of the record that the findings of fact related to the statewide progress toward desegregation of public higher education in Tennessee are not clearly erroneous. The appellants assert error in the alleged failure of the district court to consider all the evidence before it. The mere fact that particular evidence is not mentioned in an opinion does not mean that it was not considered.[2] It was the duty of the District Judge as trier of the facts to weigh the evidence. We have no authority to direct that certain evidence be accepted and other evidence rejected, and no basis for assuming that competent evidence was not considered.

A

The appellants charge that the constitutional command to dismantle the dual system immediately will not be satisfied by adherence to the long range plan. Cf. *Green v. County School*

---

[2] See Advisory Committee's Note of 1946 to Rule 52(a):

> But the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters, there is no necessity for over-elaboration of detail or particularization of facts.

Quoted in 5A J. Moore, Federal Practice ¶ 52.01(5), at 2607 (2d ed. 1977).

Board, 391 U.S. 430 (1968). The district court fully recognized the duty to require "a plan that promises realistically to work now." *Id.* at 439. In its 1972 opinion, *Geier v. Dunn*, 337 F. Supp. 573, the court discussed the fundamental differences in public higher education and public elementary and secondary education which require different approaches to dismantling dual systems:

> Thus, regarding the disestablishment of a dual system of higher education, a court cannot—at least in the usual situation—order the transfer of faculty from one institution to another, order the transfer of students from one institution to another, or actually set the curricula at various such institutions. Over and above the question of such a court's actual *power* to do so, such relief would not be administratively feasible, because there would be no way to ensure that it actually worked; no court can "order" a student to confine himself to one college or university instead of another, for, unlike the situation in a system of elementary or secondary education, such persons are free to leave and go elsewhere as they wish. The lesson is that, when it comes to the disestablishment of a dual system of higher education, a federal court *cannot* do what it might do in the realm of lower and secondary education; what works in one system will not work in another. Yet this is so as a practical matter, and not as a result either of there being less of a duty owed by a state to dismantle a dual system of higher education or of a lack of power—at least in a jurisdictional sense—on the part of a federal court to remedy such a situation. The limiting factor, from the court's point of view, is "What will work?"
>
> 337 F.Supp. at 579. (footnotes omitted).

We believe that the quoted language demonstrates a faithful adherence by the district court to the constitutional require-

ments. A careful weighing of many factors led the court to conclude that the long range plan offered the most realistic promise for desegregation of public higher education within a reasonable time. Instant desegregation is not achievable and has not been required. As we point out in our discussion of the HEW revised criteria, *infra*, "sequential implementation" over a period not to exceed five years is an accepted practice.

Though the district court approved the principle of phased steps toward statewide desegregation, it did not hesitate to require immediate action where local conditions required it. Thus, once the court concluded that the actions of UT-N were hindering the dismantling of segregation in the Nashville area, it applied the "radical remedy" of a court-ordered merger. When the proposed location for the campus of a community college in Shelby County threatened to increase rather than decrease segregation the court enjoined construction at that site. The district court demonstrated its determination to implement the constitutional demand for "whatever steps are necessary" (*Green*) to achieve desegregation by taking prompt and decisive action in these instances.

We find no error in the district court's conclusion that desegregation was progressing at a steady and acceptable rate outside Nashville and that the long range plan gave promise of continued progress. The court retained jurisdiction to implement its judgment and orders. If this progress should halt or seriously falter the court will be in position to impose new requirements.

B

The appellants also contend that the district court committed legal error in "abdicating" its duty to supervise desegregation by placing this responsibility on the monitoring committee. In *E.E.O.C. v. Detroit Edison Co.*, 515 F.2d 301, 317 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977), we

held that a district court could not delegate to a citizen committee its duty to resolve disputes arising under its decree. The functions of the monitoring committee established by the long range plan are to review and report on progress, to make recommendations for changes and to make such other studies as may be necessary to monitor the program of desegregation. The district court clearly expected valuable assistance from it but there was no delegation of any judicial responsibilities to this committee. The district court retained its full authority to control the program of desegregation, looking to the monitoring committee for reports and recommendations. This was not an abdication of the court's duty.

C

The appellants further argue that it was error to approve a plan which dealt with the various institutions individually rather than taking a statewide approach as prescribed in *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973). *Adams* was an action brought pursuant to Title VI of the Civil Rights Act of 1964 to compel the Secretary of HEW to require desegregation of public higher education in a number of southern states. The decision in *Adams* does not enunciate the rule that a plan which approaches a statewide problem of desegregation fails to satisfy constitutional standards by treating the several institutions individually. The constitutional requirement is to dismantle the dual system as quickly as possible, using methods which may be realistically expected to work. No institution was excluded from the Tennessee long range plan and it is statewide in scope. There is no merit to this argument.

V

After briefing of this appeal was completed the appellants filed a motion for leave to file a supplemental brief. The proposed brief and several exhibits were filed with the motion.

This motion was passed to the merits of the appeal and is now granted. The single proposition argued in the supplemental brief is, "The HEW Revised Criteria and Progress Report Indicate that the Lower Court Erred in Implementation of the Nashville Merger and Statewide Desegregation." The revised HEW criteria are those issued on February 15, 1978 and the progress report referred to is the annual report required by the long range plan dated February 16, 1978. The district court has not had an opportunity to consider this argument and we do not reach it. Though we take judicial notice of the revised HEW criteria, neither they nor the February 16, 1978 progress report are part of the record on appeal. Our examination of the revised HEW criteria discloses many similarities and many differences between them and the long range plan. The HEW criteria obviously deal with long-term objectives. The criteria require timetables for the *sequential implementation* of necessary actions in order to achieve stated goals "as soon as possible, but not later than within five years . . ." 43 Fed. Reg. at 6661. The goals which are required are referred to as "benchmarks." A benchmark is a standard by which to measure future achievement. An acceptable plan is described as one which assures that students will be attracted to each institution on the basis of educational programs and opportunities uninhibited by past practices of segregation. The long range plan appears to contain many of the elements of an acceptable plan under the HEW criteria. It is interesting to note that Judge Gray's statement of facts requiring special consideration in developing a plan for desegregation in higher education (*Geier v. Ellington*, 288 F. Supp. at 943) is quoted in the statement of "legal and educational principles" in the preamble to the criteria. 43 Fed. Reg. at 6659.

Upon issuance of the mandate from this court the parties will be free to seek a hearing in the district court on any motions related to developments since the judgment was entered in this case. Matters related to the February 16, 1978 progress report

and the revised HEW criteria should be presented in this manner. It would lengthen this opinion unduly to discuss in detail each assignment of error. On the record before this court we hold that the findings of fact of the district court are supported by substantial evidence and no errors of law requiring reversal were committed. As has been emphasized repeatedly herein, the district court has retained jurisdiction to oversee implementation of the long range plan. If further refinements of the plan or new devices are required to reach the condition which the Constitution requires, nothing contained in this opinion will hinder the district court from taking all steps reasonably calculated to achieve that goal.

The judgment of the district court is affirmed. No costs are allowed.

APPENDIX B

Nos. 77-1621/23/25

United States Court of Appeals for the Sixth Circuit

Rita Sanders Geier, et al.,
Plaintiffs-Appellees,
United States of America,
Intervening Plaintiff-Appellee,
Raymond Richardson, Jr., et al.,
Intervening Plaintiffs-Appellees,
v.
University of Tennessee, et al.,
Defendants-Appellants,
Tennessee Higher Education Commission,
Defendant-Appellant,
State Board of Regents,
Defendant-Appellant.

Order
(Filed
May 10, 1979)

BEFORE: LIVELY and ENGEL, Circuit Judges; and PECK, Senior Circuit Judge.

Upon consideration of the applications for stay of mandate filed by the defendants-appellants University of Tennessee and Tennessee Higher Education Commission the court concludes that a stay is not appropriate. Accordingly, the motion for stay is denied.

Judge Engel dissents and would grant a stay limited to the implementation of the proposed merger.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX C

No. 77-8122

United States Court of Appeals for the Sixth Circuit

Rita Sanders Geier, et al.,
Plaintiffs-Appellees,
United States of America,
Plaintiff-Appellee,
Raymond Richardson, Jr., et al.,
Plaintiffs-Appellees,
v.
University of Tennessee, et al.,
Defendants,
Tennessee Higher Education Commission,
Defendant-Appellant.

Order
(Filed
Oct. 13, 1977)

Appellant Tennessee Higher Education Commission has filed a motion "For a Stay of the District Court's Order Pending Appeal, and for an Expedited Hearing of the Appeal." Upon consideration, it is ORDERED that this appeal be consolidated with case No. 77-8116/7 in accordance with the procedures outlined in the order filed thereon October 3, 1977.

It is further ORDERED that the motion for stay be and it hereby is denied and the motion to advance be and it hereby is granted.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX D

No. 77-8116/7

United States Court of Appeals
for the Sixth Circuit

Rita Sanders Geier, et al.,
Plaintiffs-Appellees,
United States of America,
Plaintiff-Intervenor,
Appellee,
Raymond Richardson, Jr., et al.,
Plaintiffs-Intervenors,
Appellees,
v.
University of Tennessee, Edward J. Boling, Board of Trustees and its Vice Chairman,
Defendants-Appellants.

Order
(Filed Oct. 3, 1977)

Appellants Richardson, et al., have filed a "motion for suspension of rules and to require expedited briefing and argument schedule." Upon consideration, it is ORDERED that the appeal of Richardson, et al., be consolidated for briefing and hearing with the other appeals in this cause in accordance with the below indicated schedule.

Appellants University of Tennessee, et al., have filed a "motion to stay and to advance the hearing of appeal." This motion is opposed by the appellee State Board of Regents, the appellees

Richardson, et al., and the appellee United States. Upon consideration, it is ORDERED that the motion for stay be and it hereby is denied. It is further ORDERED that the motion to advance be granted. Upon the filing of the completed transcript in this office, the Clerk is to direct counsel to file appellants' briefs and joint appendix within thirty (30) days and appellees' briefs within thirty (30) days after service of appellants briefs. Upon filing of these briefs, the Clerk is directed to schedule the case for oral argument at the earliest practicable date.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX E

In the United States District Court
for the Middle District of Tennessee
Nashville Division

Rita Sanders Geier, et al.,
Plaintiffs,
United States of America,
Plaintiff-Intervenor,
Raymond Richardson, Jr., et al.,
Plaintiffs-Intervenor,
vs.
Ray Blanton, et al.,
Defendants.
} Civil No. 5077

Order

(Filed August 22, 1977)

The University of Tennessee, a defendant, has moved that the court stay the Judgment heretofore entered herein. Responses have been filed by other parties to the action.

Upon consideration of the entire record, the court is of the opinion that a stay would merely result in additional delay in the correcting of a constitutional violation found by the court to have been committed. The court recognizes that there are

various issues of fact and of law that can be considered by the appellate court but does not feel that the movant has demonstrated a probability of a reversal of the Judgment. The court further recognizes that the normal appellate process may take a considerable period of time but takes note of the fact that such time may be considerably shortened by the treating of the appeals herein on an expedited basis. No request for an expedited appeal has been made by any of the parties hereto, including the movant.

The motion for a stay is DENIED.

/s/ FRANK GRAY, JR.
Senior Judge

see

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